

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

POST OFFICE BOX SERVICE ENHANCEMENTS

Docket No. MC2012-26

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO  
THE PUBLIC REPRESENTATIVE'S SURREPLY**

(August 9, 2012)

The United States Postal Service ("Postal Service") hereby provides its response to the Public Representative's Surreply, filed on August 6, 2012 ("Surreply"). The Surreply consists of a fourteen page rejoinder offering six arguments opposing the Postal Service's interpretation of 39 C.F.R. § 3007.3(c).<sup>1</sup> The Public Representative ("PR") summarizes the Postal Service's argument as seeking to absolutely bar, "in virtually all circumstances," participants from filing motions requesting that the Commission issue information requests.<sup>2</sup> The PR further states that "the Postal Service's assertions could be chilling public participation in Commission proceedings."<sup>3</sup> The PR concludes by requesting that the Postal Regulatory Commission ("Commission") "clarify that participants may file motions requesting that the Commission issue information requests in proceedings such as this one."<sup>4</sup>

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<sup>1</sup> Docket No. MC2012-26, Public Representative Surreply to United States Postal Service Opposition to Mr. David B. Popkin's Request for a Presiding Officer Information Request ("Surreply") (August 6, 2012).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 13.

Regrettably, several aspects of the PR's Surreply warrant a response. In particular, the PR makes several incomplete assertions that could misinform the Commission, and sets up a straw man by incorrectly framing the Postal Service's argument. The PR subsequently uses that straw man to justify its pleading, implying that the Postal Service is attempting to intimidate an "unsophisticated litigant."<sup>5</sup> This is simply not the case. While the Postal Service could provide a full response to the PR's Surreply, it is limiting this pleading to a select number of issues to avoid any further, unnecessary motion practice. The Postal Service believes that the Commission will benefit from the additional information presented herein.

### **Background**

On July 19, 2012, the Commission received the Request of David B. Popkin for a Presiding Officer's Information Request ("Request").<sup>6</sup> The Request asked that the Commission issue a Presiding Officer's Information Request ("POIR") ordering the Postal Service to respond to ten questions (akin to interrogatories) concerning Attachment C of the Postal Service's Response to Order No. 1366, filed on July 9, 2012. On July 24, 2012 the Postal Service filed its Opposition to Mr. Popkin's Request.<sup>7</sup>

In its Opposition, the Postal Service requested that the Commission deny Mr. Popkin's request for two primary reasons: 1.) because granting Mr. Popkin's

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<sup>5</sup> *Id.* at 2.

<sup>6</sup> Docket No. MC2012-26, Request of David B. Popkin for a Presiding Officer's Information Request (July 19, 2012).

<sup>7</sup> Docket No. MC2012-26, Opposition of the United States Postal Service to Mr. David B. Popkin's Request for a Presiding Officer's Information Request ("Postal Service Opposition") (July 24, 2012).

request would not be in keeping with the Commission's reasoning for establishing the present docket; to avoid a time consuming and costly adversarial proceeding,<sup>8</sup> and; 2.) because Mr. Popkin's request was inconsistent with the rules under 39 C.F.R. § 3020.30 *et seq.*<sup>9</sup> In support of its position, the Postal Service explained that the Commission chose to establish this docket in order to provide the parties with "a more efficient, less costly means to address the issues in dispute,"<sup>10</sup> and that the rules under 39 C.F.R. § 3020.30 *et seq.* only provided for "[a] specified period for public comment."<sup>11</sup> Additionally, the Postal Service noted that its interpretation conformed to the rest of the Commission's rules, which specifically authorize participants to submit proposed questions in other proceedings.<sup>12</sup> In keeping with the rules under 39 C.F.R. § 3020.30 *et seq.*, the Postal Service recommended that Mr. Popkin raise his concerns by filing comments. On July 26, 2012, the PR filed its Response to the Postal Service's Opposition.<sup>13</sup>

In its Response, the PR claimed that the Postal Service misrepresented the Commission's rules, and directed the Commission's attention to 39 CFR § 3007.3(c).<sup>14</sup> The PR claimed that this rule gave participants in any proceeding the right to file motions requesting that the Commission issue a data or

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<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Postal Service Opposition, *supra* note 7, at 3 (citing 39 C.F.R. § 3010.65(c)).

<sup>13</sup> Docket No. MC2012-26, Public Representative Response To United States Postal Service Opposition To Mr. David B. Popkin's Request For A Presiding Officer Information Request ("PR Response") (July 26, 2012).

<sup>14</sup> *Id.* at 1-2.

information request.<sup>15</sup> Since the PR accused the Postal Service of misrepresenting the law (a fact that the PR glibly dismissed as hyperbole in its most recent pleading),<sup>16</sup> the Postal Service had no choice but to respond. The Postal Service filed its Response in Opposition to the PR's Reply Comments ("Response in Opposition") on July 27, 2012.<sup>17</sup>

In its Response in Opposition, the Postal Service argued that rule 3007.3(c) did not apply as broadly as the PR suggested, but was instead limited to instances where the Postal Service had filed non-public information with the Commission.<sup>18</sup> The Postal Service supported its argument by making two primary points: 1.) that the rule was placed in Part 3007 - Treatment of Non-Public Materials Provided by the Postal Service,<sup>19</sup> and; 2.) that in Order No. 194 in Docket No. RM2008-1, the Commission interpreted rule 3007.3(c) in a way that limited its application to instances involving non-public information.<sup>20</sup> The Postal Service also noted that its interpretation of 3007.3(c) conformed to the construction of the Commissions rules, which specifically authorize participants to submit proposed questions in other proceedings.<sup>21</sup> In conclusion, the Postal Service reiterated its request that the Commission deny Mr. Popkin's original motion for a POIR.<sup>22</sup> The PR filed its Surreply on August 6, 2012.

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<sup>15</sup> *Id.* at 2.

<sup>16</sup> Surreply, *supra* note 1, at 1.

<sup>17</sup> Docket No. MC2012-26, Response of the United States Postal Service in Opposition to the Public Representative's Motion for Leave to File a Response ("Response in Opposition") (July 27, 2012).

<sup>18</sup> *Id.* at 3-5.

<sup>19</sup> *Id.* at 3-4.

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> Response in Opposition, *supra* note 17, at 6.

## Argument

First, despite the PR's assertions to the contrary, the Postal Service has not argued that Mr. Popkin is barred from filing a motion requesting that the Commission issue an information request. Rather, as summarized above, the Postal Service has simply offered arguments in support of its request that the Commission deny Mr. Popkin's motion. As the PR aptly points out, it would likely be futile to argue that participants are barred from filing such motions, since 39 C.F.R. § 3001.21 allows for almost any motion to be submitted.<sup>23</sup> However, the mere authority to file a motion does not mean that a motion's purpose/content is appropriate in the context of every docket. To the extent that the Postal Service made any statements suggesting that Mr. Popkin could never file a motion, they were largely made in response to the PR's argument that 39 C.F.R. § 3007.3(c) was the wellspring of that authority.

Consequently, rather than attempting to chill public participation in Commission proceedings, the Postal Service has simply argued that motions requesting POIRs are not generally appropriate in mail classification dockets. Given the existence of an established public comment period, the streamlined nature of mail classification proceedings, and the fact that nonpublic information has not been filed in this docket, there is simply no overarching need for such requests. Participants are free to submit their concerns via comments, providing the Postal Service with an opportunity to respond and for the Commission to issue a Chairman's Information Request ("CHIR"). Indeed, accepting motions for

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<sup>23</sup> Surreply, *supra* note 1, at 5-6.

POIRs or CHIRs in mail classification dockets can only slow down these “more efficient, and less costly”<sup>24</sup> proceedings.

Second, the PR argues that the scope of Part 3007 (30 C.F.R. § 3007.2) and the preamble of the Second Notice of Proposed Rulemaking in Docket No. RM2008-1, strongly suggest that the rules under Part 3007 are not limited to requests for non-public information.<sup>25</sup> However, this argument misses a very salient point. Significantly, in the introduction of the Second Notice of Proposed Rulemaking in RM2008-1, the Commission states that it “proposes to implement 39 U.S.C. 504(g) by adopting regulations applicable to confidentiality of materials submitted by the Postal Service to the Commission.”<sup>26</sup> This statement is reiterated in the introduction of the Final Rule.<sup>27</sup> Not only does this statement clearly confine the rules to the confidentiality of materials submitted by the Postal Service, an examination of section 504(g) reveals that it is limited to the Commission’s treatment of nonpublic information filed by the Postal Service.<sup>28</sup> Thus, the PR’s interpretation of the rules under Part 3007 flies in the face of the statutory authority cited by the Commission. Even if the Commission intended

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<sup>24</sup> Docket No. C2012-1, Order No. 1366: On Motion to Dismiss Holding Complaint in Abeyance Pending Further Proceeding, at 2 (June 13, 2012).

<sup>25</sup> Surreply, *supra* note 1, at 9-11.

<sup>26</sup> Docket No. RM2008-1, Order No. 194: Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, at 1 (“Second Proposed Rulemaking”) (March 20, 2009).

<sup>27</sup> Docket No. RM2008-1, Order No. 225: Final Rule Establishing Appropriate Confidentiality Procedures, at 1 (June 19, 2009).

<sup>28</sup> 39 U.S.C. § 504(g)(3)(B) states that “[p]aragraph (2) shall not prevent the Commission from requiring production of information in the course of any discovery procedure established in connection with a proceeding under this title.” Though the PR might seize upon this language as supporting the applicability of 39 C.F.R. § 3007.3(c) more broadly, reading this paragraph in conjunction with 39 U.S.C. § 504(g)(2), clearly indicates that it is designed to ensure that the Commission is not prevented from providing third-parties with access to nonpublic information.

the rules under Part 3007 to apply more broadly, it could not do so pursuant to the authority cited.

Finally, the PR claims that accepting the Postal Service's interpretation of Part 3007 could cause the Commission to act in an *ultra vires* manner every time it issued an information request of its own accord.<sup>29</sup> This is simply incorrect. First, and most strangely, accepting the PR's argument could cause the peculiar outcome of rendering most POIRs and CHIRs issued prior to Docket No. RM2008-1, *ultra vires*. Second, the Postal Service is unable to find a POIR or CHIR that cites to the rules under section 3007.3 as the basis of the Presiding Officer's authority. Finally, the PR's argument ignores the fact that a Presiding Officer is free to take any action relevant to the execution of his/her duties pursuant to 39 C.F.R. § 3001.23(10). Consequently, the Postal Service does not believe that the Commission's authority to issue information requests would be threatened by accepting the Postal Service's interpretation of the 39 C.F.R. § 3007.3(c).

### **Conclusion**

At base, the Postal Service's position is simple; under normal circumstances, the streamlined nature of mail classification proceedings should be observed. Indeed, the Commission's Rules of Practice & Procedure represent a careful harmonization of the PAEA's bedrock principles, namely flexibility, accountability, and transparency. In designing the rules applicable to mail classification dockets, the Commission deliberately chose to adopt a streamlined set of procedures that consolidated normally burdensome discovery

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<sup>29</sup> Surreply, *supra* note 1, at 11-12.

actions into a single public comment period. Thus, under normal circumstances, motions requesting that the Commission issue information or data requests do nothing more than circumvent these normally efficient procedures. Moreover, adopting the PR's interpretation of 39 C.F.R. § 3007.3 would not only be incorrect, but could fundamentally disrupt the balance achieved in the Commission's rules.

Consequently, the Postal Service reiterates its request that the Commission deny David B. Popkin's request for a Presiding Officer's Information Request. The Postal Service hopes that the Commission will act expeditiously to resolve the differing interpretations of the rules under 39 C.F.R. § 3007.3.

Respectfully submitted,

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